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In the Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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QUESTION PRESENTED

Whether Section 301(*l*) of the Clean Water Act, 33 U.S.C. 1311(*l*), bars the Environmental Protection Agency from granting variances from national pretreatment standards for toxic pollutants to plants having fundamentally different factors from those considered by EPA in establishing the national standards.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A88)[1] is reported at 719 F.2d 624.

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[1] "Pet. App." refers to the Appendix to the Petition in No. 83-1013.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1983. The petition for a writ of certiorari in No. 83-1013 was filed on December 19, 1983. By order dated December 12, 1983, Justice Brennan extended the time to file a petition for a writ of certiorari in No. 83-1373 until February 17, 1984, and the petition was filed on that date. The petitions were granted, and the cases were consolidated on April 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, are reproduced at Pet. App. A116-A121. The "fundamentally different factors" (FDF) variance provision, 40 C.F.R. 403.13, is reproduced at Pet. App. A122-A127.

STATEMENT

The Clean Water Act, 33 U.S.C. 1251 *et seq.*, requires the Administrator of the United States Environmental Protection Agency (EPA) to regulate two types of industrial facilities: (1) "direct" dischargers, *i.e.*, facilities that discharge waste water directly into navigable waters; and (2) "indirect" dischargers, *i.e.*, facilities that discharge waste water into publicly owned treatment works (POTWs) prior to discharge into navigable waters. For both types of dischargers, EPA conducts rulemaking proceedings and promulgates nationwide, technology-based requirements applicable to categories of dischargers (*e.g.*, iron and steel, metal finishing, and leather tanning).

In each rulemaking proceeding, EPA attempts to gather as much data as possible regarding facilities in the particular category. Nationwide requirements for all plants in that category are based on these data. On occasion, however, the Agency may be unaware of or may not consider a factor that is applicable to a few plants and that would dictate a change in the requirements applicable to those facilities. The EPA has therefore developed a mechanism by which the national requirements may be adjusted, on a case-by-case basis, to better suit those few atypical plants. This vehicle is known as the "fundamentally different factors" (FDF) variance. As its name suggests, this mechanism allows variances for existing sources that can demonstrate that their situation is characterized by factors that are "fundamentally different" from those considered by EPA in developing the national rule for their category.

In this case, the court of appeals held that the Clean Water Act prohibits EPA from issuing such FDF variances to indirect dischargers[2] with respect to all pollutants identified under the Act as toxic. The issue in this case is whether the court's conclusion is correct.

1. Because the agency's regulation of indirect dischargers is patterned after its regulation of direct

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[2] The FDF variance provision for indirect dischargers, which was struck down by the court of appeals in this case, is found at 40 C.F.R. 403.13 (Pet. App. A122). EPA has promulgated an analogous provision for direct dischargers, 40 C.F.R. 125.30 *et seq.*, which the respondent herein has challenged in the United States Court of Appeals for the District of Columbia Circuit. *NRDC* v. *EPA*, No. 80-1607 and consolidated cases. That case has not yet been briefed. As discussed below, the court of apepals' reasoning in this case would apply equally to direct dischargers.

dischargers, a brief review of the statutory scheme applicable to both types of dischargers is nceessary. The Act requires direct dischargers to be regulated through phased implementation of technology-based requirements. By July 1, 1977, existing direct dischargers were required to meet effluent limitations based on the "best practicable control technology currently available" (BPT). 33 U.S.C. 1311(b)(1)(A). By July 1, 1984, such dischargers were obligated to meet potentially more stringent effluent limitations for toxic pollutants based upon the "best available technology economically achievable" (BAT). 33 U.S.C. 1311(b)(2)(A) and (C). "New source" direct dischargers must meet new source performance standards (NSPS) based on the "best available demonstrated control technology" (BADT). 33 U.S.C. 1316. The Act required the Administrator to amass a wide range of information and to publish "regulations, providing guidelines," based upon specific criteria, for the BPT and BAT effluent limitations and new source performance standards. 33 U.S.C. 1314(b)(1)(B), (b)(2)(A), and (B). See *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116 (1977) [hereinafter *duPont*].

2. The development of national technology-based requirements for direct and indirect dischargers has proven to be an enormous and complex undertaking. For each industrial category, the Agency and its contractors typically seek to obtain as much information as possible regarding all of the relevant factors, including the types of industrial processes involved, water use practices, the nature and amounts of pollutants in raw waste water, and the costs and effectiveness of various waste water treatment technologies. Questionnaires requesting information on these

matters, as well as cost and financial data, are typically sent to at least a cross section of affected plants. Representative facilities are then selected for visits and on-site sampling in order to gain more detailed information. Data are collected on the treatment efficiency of technologies already being used, and tests are often conducted to determine the feasibility and effectiveness of other potential technologies. In addition, the Agency's contractors attempt to determine model costs (both capital and annualized) for various treatment technologies and, using available financial data, they assess the potential impacts on the industry, including estimated plant closures and the effect on employment and prices. The treatment efficiency of each technology is determined on a national basis through the combined use of statistical analyses and engineering judgments.[3] In most instances, EPA has found that application of one or more of the statu-

[3] The scope of the task of formulating national categorical standards is illustrated by the procedures followed by EPA in developing the BPT-level electroplating pretreatment standards that were unsuccessfully challenged in the proceedings below. EPA initially sent questionnaires to over 500 plants that it had identified as possibly falling within the category. Of these plants, approximately 200 provided at least some of the requested information. On the basis of the responses, EPA conducted on-site visits of 82 plants to take samples of raw and treated waste water over several days, inspect treatment technology already in place, and collect other first-hand information. These visits enabled EPA to determine that approximately 25 of the plants were representative in terms of treatment technology, character of raw waste water, and other factors. The data from these plants were then used to derive achievable effluent limitations, using a combination of statistical methodologies and engineering judgments.

tory factors warrants different requirements for separate subcategories within the national category.[4]

3. During the rulemaking process, the Agency attempts to obtain all pertinent information. However, due to the magnitude of the effort involved in each categorical rulemaking, the Agency occasionally may not consider a unique factor that applies to a few plants and would dictate a change in the requirements applicable to those facilities. In addition, a particular plant may be so different from all of the other plants considered by the Agency that the factors generally deemed relevant to the treatment capabilities of the other plants are inapplicable to the circumstances of that particular plant.

Moreover, from the outset EPA has been subjected to very stringent court-ordered deadlines for developing these technology-based regulations. Section 304 (b)(1) of the Act, 33 U.S.C. 1314(b)(1), directed EPA to issue BPT guidelines for all industrial categories within one year after the statute's enactment, *i.e.*, by November 1973. This task proved impossible, and in 1973 the respondent herein, the Natural Resources Defense Council, Inc. (NRDC), sued the Agency to establish these guidelines. As a result of this litigation, EPA was placed under a timetable for promulgating BPT effluent limitations guidelines for categories of direct dischargers. *NRDC* v. *Train*, 6 Env't Rep. Cas. (BNA) 1033 (D.D.C. 1973), rev'd in part and remanded in part, 510 F.2d 692 (D.C. Cir. 1974). Because of these schedules and the fact that the guidelines required under Section 304 of the Act, 33 U.S.C. 1314, had not yet been issued, the

[4] For example, in the BPT electroplating pretreatment rulemaking, the electroplating category was subdivided into seven categories. 40 C.F.R. Pt. 413.

Agency adopted a regulatory approach that combined its obligations under certain provisions of the Act. Specifically, EPA developed "effluent limitations guidelines" for each industrial category. These were intended to constitute both the guidelines required by Section 304 and the nationally applicable effluent limitations that, under Section 301(b), 33 U.S.C. 1311(b), must be achieved by all dischargers within the category.[5] In view of the complexity of the national rulemaking efforts for each category, EPA included in its categorical regulations an FDF variance provision to ensure that facilities with unique, plant-specific factors were not unfairly treated as a result of the tight judicial deadlines.[6]

EPA's approach came under attack from both sides. On the one hand, industry challenged EPA's authority to establish BPT requirements, contending that EPA could only set guidelines under Section 304 of the Act and that only individual permit writers could set the specific effluent limitations applicable to each facility within the category. On the other hand, NRDC, while accepting EPA's authority to establish BPT requirements for categories of dischargers, argued that the Agency could not authorize FDF variances based on plant-specific factors.

A number of courts of appeals issued conflicting rulings with respect to industry's challenge.[7] NRDC's challenge, however, was rejected in *NRDC* v. *EPA*,

[5] See generally Parenteau & Tauman, *The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972?*, 6 Ecology L.Q. 1 (1976).

[6] *E.g.*, 40 C.F.R. 415.220 *et seq.* (1976) (inorganic chemicals).

[7] See cases collected in *duPont*, 430 U.S. at 125.

537 F.2d 642 (2d Cir. 1976), which upheld the FDF variance provision as an appropriate "administrative safety valve" that "permits a more rigorous adherence to an effective regulation" and that accommodates the need to promulgate national regulations quickly while allowing individual problems to be dealt with later (*id.* at 646-647).[8]

Ultimately, EPA's approach was upheld by this Court in *duPont*. The Court held that EPA had properly construed its authority under Sections 301 and 304 of the Act and that the Agency has the authority to issue nationally applicable regulations for existing direct dischargers, "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations" (430 U.S. at 128 (footnote omitted)).[9]

4. The Agency's regulatory effort with respect to indirect dischargers has been patterned after its approach with respect to direct dischargers. Indirect dischargers are subject to "pretreatment" standards applicable to pollutants, including toxic pollutants, that are not susceptible to treatment by or would

[8] The District of Columbia Circuit likewise approved of EPA's approach of setting nationally applicable BPT regulations tempered by the FDF variance mechanism. *American Frozen Food Institute* v. *Train*, 539 F.2d 107, 131 (1976).

[9] Several courts of appeals subsequently took note of *duPont* in emphasizing the importance of the FDF variance mechanism to the categorical rulemaking process. *E.g.*, *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1037 (D.C. Cir. 1978); *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979); *Appalachian Power Co.* v. *Train*, 620 F.2d 1040, 1044-1048 (4th Cir. 1980).

interfere with the operation of POTWs.[10] 33 U.S.C. 1317(b). Like the direct discharger requirements, pretreatment standards must be established by notice-and-comment rulemaking for categories of dischargers. 33 U.S.C. 1317(b)(3). And as with direct discharger requirements, EPA was required by Section 304(g)(1) of the Act, 33 U.S.C. 1314(g)(1), to publish guidelines for the establishment of pretreatment standards. EPA decided at an early stage to use the technology-based criteria specified by statute for direct dischargers as the basis for indirect discharger requirements. However, as was the case with the direct discharger requirements, the Agency fell behind in promulgating pretreatment standards, and NRDC soon brought suit seeking a court-ordered schedule for promulgating pretreatment standards. That litigation culminated in a consent decree that placed EPA under stringent deadlines for promulgating categorical pretreatment standards. The decree also incorporated EPA's preferred regulatory approach of using the technology-based BPT, BAT, and NSPS criteria to develop the indirect discharger requirements. *NRDC* v. *Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), modified *sub nom.* *NRDC* v. *Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979), modified *sub nom. NRDC* v. *Gorsuch*, No. 2153(D.D.C. Oct. 26, 1982), modified *sub nom.* *NRDC* v. *Ruckelshaus*, No. 2153 (D.D.C. Aug. 2, 1983 & Jan. 6, 1984). In subsequent amendments to the Act in 1977, Congress sanctioned this approach to establishing pretreatment standards. See *Environ-*

[10] Indirect dischargers that would be considered new sources under 33 U.S.C. 1316 if they were direct dischargers are subject to new source pretreatment standards. 33 U.S.C. 1317(c).

mental Defense Fund, Inc. v. *Costle*, 636 F.2d 1229, 1244 (D.C. Cir. 1980).

Since the pretreatment regulatory effort was patterned after the approach to direct dischargers, when EPA turned its attention to establishing pretreatment standards, it similarly provided an FDF variance mechanism in its General Pretreatment Regulations for existing indirect dischargers. 40 C.F.R. 403.13.[11] This provision allows EPA to establish a *more or less* stringent standard if the affected facility, the POTW, or any other interested person shows (1) that the facility is fundamentally different from other plants in the category with respect to one or more of the factors considered by EPA in establishing the standards and (2) that compliance with the national standard would result either in a pollutant removal cost wholly out of proportion to the costs considered by EPA in setting the national standard or a non-water-quality environmental impact (such as the amount of energy required) that is fundamentally more adverse than those considered in developing the standard. 40 C.F.R. 403.13(c). Among the factors that may justify a variance are the nature, quantity, or combination of pollutants in a particular facility's wastewater; the volume of wastewater discharged by a facility; the amount of energy required for a facility to meet the pretreatment standard; the amount of space available for installation of the required control technology; and the cost of compliance. 40 C.F.R. 403.13(d). However, factors having nothing to do with the appropriateness of the pretreatment standard—such as a particular

[11] In accordance with *duPont* (see 430 U.S. at 137), FDF variances are not allowed for new source indirect dischargers. See 40 C.F.R. 403.13(b).

facility's "ability to pay for the required waste treatment" (40 C.F.R. 403.13(e)(3))—are not grounds for a variance.

The FDF variance does not excuse compliance with a correct requirement but instead represents an acknowledgement that not all relevant factors were taken sufficiently into account in framing the requirement in the first place. As the Agency has described it (44 Fed. Reg. 32854, 32893 (1979)):

> No discharger * * * may be excused from the Act's requirement to meet * * * a pretreatment standard through this variance clause. A discharger may instead receive an individualized definition of such a * * * standard where the nationally prescribed limit is shown to be more or less stringent than appropriate for the discharger under the Act.

In effect, the FDF variance creates a new subcategory for the discharger in question based on factors that would have justified—and required—the creation of that subcategory had EPA been aware of those factors or taken them into account during the national rulemaking process.

5. In a petition for review filed in the United States Court of Appeals for the Third Circuit, NRDC challenged the FDF variance provision on two grounds (see Pet. App. A38-A40).[12] First, NRDC argued that because the Clean Water Act does not specifically authorize FDF variances, EPA lacks the

[12] The court of appeals also considered challenges by numerous parties to various aspects of EPA's General Pretreatment Regulations, 43 Fed. Reg. 27736 (1978), as amended, 46 Fed. Reg. 9404 (1981), and to EPA's categorical pretreatment standards for existing electroplating sources, 44 Fed. Reg. 52590 (1979), as amended, 46 Fed. Reg. 9462 (1981).

authority to grant them (*id.* at A38-A39). Second, NRDC contended (*id.* at A40) that Section 301(*l*) of the Act, 33 U.S.C. 1311(*l*), which was added to the statute in 1977, specifically prohibits such variances insofar as they apply to toxic pollutants. Section 301(*l*) provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list."

In response to NRDC's first argument, EPA contended (Pet. App. A39) that the statute accords the Administrator the discretion to adjust national standards for particular plants. EPA relied on *duPont*, in which this Court held (see 430 U.S. at 128) that EPA may establish nationally binding BPT effluent limitations guidelines provided that variances are available for individual plants. With respect to NRDC's second argument, EPA argued (Pet. App. A41) that Section 301(*l*) was not intended to bar the Agency's longstanding practice of granting FDF variances but was instead meant only to prohibit those modifications authorized by Section 301(c) and (g) of the Act, 33 U.S.C. 1311(c) and (g), which allow modifications of BAT requirements based, respectively, on a facility's inability to afford installation of the required control technology and the high quality of the waters into which the discharge will be made.

6. The court of appeals held that Section 301(*l*) prohibits the granting of FDF variances for toxic pollutants (Pet. App. A36-A43). The court rejected (Pet. App. A39) EPA's contention that this Court's decision in *duPont* supported EPA's authority to grant FDF variances from pretreatment standards. The court also rejected EPA's contention that FDF

variances are not the type of "modifications" that Section 301(*l*) was intended to prohibit (Pet. App. A42-A43). While acknowledging that "[t]he legislative history of Section 301(*l*) does indicate that Congress was primarily concerned with prohibiting modifications under Section 301(c) and (g)," the court concluded (Pet. App. A42 (footnote omitted)) that Congress did not "use[] 'modification' as a term of art so as to exclude variance provisions from the proscription of section 301(*l*)." The court also perceived no difference between "the policy behind FDF variances" and "the policies behind the 'modification' provisions" (Pet. App. A42). The court found it "difficult to imagine" why Congress would have intended to prohibit Section 301(*l*) economic affordability modifications but not purportedly "similar" FDF variances (Pet. App. A43).[13]

SUMMARY OF ARGUMENT

I

Under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Administrator of the Environmental Protection Agency was given the responsibility of issuing regulations establishing limitations on the discharge of pollutants by industrial facilities. By statute and judicial decree, demanding timetables for the promulgation of these requirements have been set.

In discharging these responsibilities, the EPA first confronted the task of establishing limitations for "direct" dischargers—plants that discharge waste directly into navigable waters. In an effort to issue

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[13] The court recognized (Pet. App. A43) that its reading of Section 301(*l*) directly conflicts with that of the Fourth Circuit in *Appalachian Power Co.* v. *Train*, *supra*.

those requirements as soon as possible, EPA decided to promulgate effluent limitations guidelines for categories of facilities—*e.g.*, all iron and steel mills or all leather tanning plants—and to base those requirements primarily upon data concerning representative or typical plants. Among other things, the agency considered the types and quantities of pollutants in a typical plant's waste water and the effectiveness and cost of various methods of eliminating these pollutants.

Because the categorical regulations were based upon a study of representative plants, EPA realized that its calculations might not be valid for all plants. For example, some plants might produce waste water with different types or quantities of pollutants; the methods of pollutant control employed by most plants might be impractical or ineffective; and the cost of complying with the categorical limitations might differ greatly from the costs considered by the Agency. In order to adapt the categorical limitations to these plants, EPA developed the practice of granting variances to those facilities able to demonstrate that they faced factors fundamentally different from those that the agency had considered in framing the categorical standards. EPA called these "fundamentally different factors" or "FDF" variances.

An FDF variance is substantively the same as an amendment refining the categorical standard to take into account factors that the Agency did not sufficiently consider in setting that standard in the first place. As this Court has explained (*EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 77-78 (1980)), an FDF "variance is an acknowledgment that the uniform * * * limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a * * * limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete."

In *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), EPA's approach to these problems was sustained. The Court held (*id.* at 128) that EPA has the authority to issue regulations setting effluent limitations for categories of facilities "so long as some allowance is made for variations in individual plants," as EPA had done through its FDF variance provisions. See also *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. at 72.

When the agency turned to the task of setting pretreatment standards for "indirect" dischargers—facilities that discharge their waste water into publicly owned treatment works—EPA followed the same approach previously used for direct dischargers. That approach was not proscribed, in EPA's view, by the enactment in 1977 of Section 301(*l*) of the Act, 33 U.S.C. 1311(*l*), which forbids the EPA to "modify" any effluent limitation or pretreatment standard for a toxic pollutant. EPA has interpreted this provision as affecting, not FDF variances, but those "modifications" authorized by Section 301(c) and (g). Section 301(c) and (g) modifications may be granted based upon a facility's financial weakness or the high quality of the water into which the discharge will be made—factors that obviously would not justify any change in the categorical standard and that accordingly are not grounds for an FDF variance. The court of appeals was mistaken in reading Section 301(*l*) as applying to FDF variances, as well as Section 301(c) and (g) modifications.

II

This case cannot be decided by looking only at the language of Section 301(*l*). There is no denying the fact that an FDF variance "modifies" an effluent limitation or pretreatment standard in the dictionary sense of the word, *i.e.*, it changes or alters those requirements. But construing Section 301(*l*) to prohibit any change or alteration in an effluent limitation or pretreatment standard for a toxic pollutant would bring that provision into conflict with another section of the Clean Water Act and would lead to absurd results that Congress could not have intended. A literalistic interpretation of Section 301(*l*) would prohibit far more than FDF variances for toxic pollutants; it would mean that effluent limitations and pretreatment standards for toxic pollutants, once issued, could never be amended by the Agency. EPA would be powerless to change its rules, even if it discovered an error in its previous analysis, compiled more accurate or more complete data, or found that technological progress had been made.

It is impossible to believe that Congress intended such absurd results. Indeed, Congress has specifically required EPA to "revise" its standards, including those for toxic pollutants, as technology and other factors change. 33 U.S.C. 1317(b)(2). Since EPA is commanded to "revise" but not to "modify" its requirements for toxic substances, it cannot plausibly be argued that the statutory language clearly supports the court of appeals' interpretation.

EPA's interpretation, on the other hand, gives the term "modify" a consistent interpretation in Section 301(c), (g), and (*l*).

III

The court of appeals acknowledged (Pet. App. A42 (footnote omitted)) that "[t]he legislative history * * * does indicate that Congress was primarily concerned with prohibiting modifications under Section 301(c) and (g)." In fact, the only legislative history directly relevant to the question presented here indicates that Section 301(*l*) was intended to affect modifications sought under Section 301(c) and (g). See pages 27-28, *infra*.

In rejecting this interpretation of Section 301(*l*), the court of appeals relied on the fact that Section 301(c) and (g) were described in passing during congressional debate as "variance" provisions. However, just because Section 301(c) and (g), which are affected by Section 301(*l*), were described as "variance" provisions, it obviously does not follow that every other "variance" provision is likewise within Section 301(*l*)'s scope.

IV

Since the statutory language and legislative history provide no clear support for the court of appeals' and respondent's construction of the Act, the only remaining question is whether the agency has adopted "a permissible construction of the statute." *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5 (footnote omitted).

Here, there can be no doubt that the EPA's interpretation was permissible. As already noted, it is inconceivable that Congress intended to prevent EPA from amending its effluent limitations and pretreatment standards for toxic pollutants, and an FDF variance is substantively the same as such an amendment. Both "modify" requirements of Section 301 in

the same way. Since neither the court of appeals nor respondent has questioned EPA's authority to amend its regulations relating to toxic pollutants, it is puzzling why they believe that FDF variances stand on a different footing. To be sure, the procedure for adopting an FDF variance differs from the procedure for amending a rule, but there is no evidence that Section 301(*l*) was at all concerned with such procedural questions. Nor is there reason to believe that the rulemaking procedure is preferable. At all events, if deference to an agency's interpretation of the statute it administers means anything, it surely must mean that the agency is free, in the absence of congressional direction, to choose between these two procedures.

ARGUMENT

THE EPA MAY GRANT "FUNDAMENTALLY DIFFERENT FACTORS" (FDF) VARIANCES FROM PRETREATMENT STANDARDS FOR ALL POLLUTANTS

A. The EPA's Practice of Allowing FDF Variances for Existing Direct and Indirect Dischargers Constitutes a Reasonable and Permissible Exercise of Discretion Under the Statute

Although the Clean Water Act does not specifically empower the Environmental Protection Agency to grant FDF variances for either direct or indirect dischargers, the EPA is clearly authorized to do so, as this Court's decisions in *duPont* and *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 72 (1980), established. The FDF variance provision for existing indirect dischargers was first promulgated in 1978, but its roots lie in EPA's regulatory program for direct dischargers, on which the pretreatment effort is

patterned. See pages 8-9, *supra*. In *duPont*, this Court upheld EPA's authority to establish binding BPT and BAT effluent limitations for categories of existing direct dischargers, "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations" (430 U.S. at 128 (footnote omitted)). In *National Crushed Stone Ass'n*, the Court reiterated (449 U.S. at 72):

> No * * * explicit variance provision exists with respect to BPT standards, but in *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), we indicated that a variance provision was a necessary aspect of BPT limitations applicable by regulations to classes and categories of point sources. *Id.*, at 128.

What the Court said in these cases about FDF variances for direct dischargers applies equally to FDF variances for indirect dischargers.

The factors that make the FDF variance provision appropriate in the direct discharger context are no less applicable in the case of indirect dischargers. As noted, regulations for both types of dischargers must be developed under stringent timetables. During this period, the Agency is required to collect and analyze large amounts of technical information concerning complex industrial categories. The possibility that EPA might overlook or fail adequately to consider unique factors applicable to a few atypical plants during the categorical rulemaking process is just as likely in the indirect discharger context as in the direct discharger context. It is thus equally important that the Agency's nationally binding categorical pretreatment standards for indirect dischargers be tempered with the flexibility that the FDF variance mechanism offers.

Both the court below and respondents have attempted to distinguish *duPont* on specious grounds. Both argue (Pet. App. A39; Br. in Opp. 6-7) that *duPont* sanctioned FDF variances only in the case of BPT limitations and that variances are appropriate in that context only because BPT limitations are described by statute as applicable to individual "point sources" (33 U.S.C. 1311(b)(1)(A)). Since pretreatment standards for indirect dischargers are described as applicable to "categories of sources" (33 U.S.C. 1317(b)(3)), it is argued that *duPont* does not support the granting of FDF variances to indirect dischargers. Respondent amplifies this argument (Br. in Opp. 6-7) by noting that in *duPont* the Court agreed with EPA (430 U.S. at 137-139) that FDF variances may not be granted in the case of "new source" standards for direct dischargers, which are described as applicable to "categories of sources" (33 U.S.C. 1316(b)(3)). Since this language is similar to that employed in describing the pretreatment standards, respondent deduces that FDF variances may not be granted to indirect dischargers.

The court of appeals' and respondents' analysis is plainly flawed. In the first place, *duPont* sanctioned FDF variances from BAT, as well as BPT, limitations, and BAT limitations apply to "categories and classes of point sources" (33 U.S.C. 1311(b)(2)(A)). The Court stated (430 U.S. at 128 (footnote omitted)):

> We conclude that the statute authorizes the 1977 [*i.e.*, BPT] limitations as well as the 1983 [14]

[14] When *duPont* was decided, the Act required compliance with BAT standards by July 1, 1983. 33 U.S.C. (1976 ed.) 1311(b)(2)(A). See 430 U.S. at 118 n.5. Later in 1977, this date was extended until July 1, 1984. 33 U.S.C. 1311(b)(2)(A).

> [*i.e.*, BAT] limitations to be set by regulation, as long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 [*i.e.*, BPT] limitations.

Moreover, the essence of the court of appeals' and respondent's argument—that Congress intended for BPT limitations to be set on a more individualized basis than BAT limitations or pretreatment standards—is contrary to *duPont's* reasoning. In *duPont*, the Court upheld EPA's authority to issue regulations establishing effluent limitations for classes of plants and rejected the argument that those limitations could only be set in individual permits. The Court first concluded (430 U.S. at 126-127) that the BAT limitations may be set on a categorical basis. The Court then turned (*id.* at 127) to the difference in the statutory language used to describe the BPT and BAT limitations. The Court held (*id.* at 127-128), however, that the BPT limitations could also be set by regulation. The Court noted (*id.* at 127) that "[n]othing elsewhere in the Act * * * suggests any radical difference in the mechanism used to impose limitations for the [BPT] and [BAT] deadlines." The argument upon which the court of appeals and respondent rely flies in the face of this reasoning.[15]

[15] Respondent's reliance upon this difference in the statutory language is all the more unconvincing in light of respondent's insistence for more than a decade that BPT direct discharger requirements be set for industrial categories of sources, just like BAT direct discharger requirements, new source performance standards, and pretreatment standards. See *NRDC* v. *Train*, 6 Env't Rep. Cas. (BNA) 1033 (D.D.C.

The court of appeals' interpretation of the statute also proves more than that Court was willing to accept or acknowledge, for it means that *no* FDF variances may be granted to indirect dischargers, not just that variances may not be granted for toxic pollutants. Respondent, by analogizing pretreatment standards to new source standards (from which FDF variances have never been granted [16]), points up this conclusion. However, not only is this conclusion inconsistent with *duPont*, for the reasons stated, but the analogy between *new source* standards and pretreatment standards applicable to *all indirect dischargers*, including those already in existence prior to the issuance of the standards, is obviously invalid. Both in the case of

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1973), rev'd in part and remanded in part, 510 F.2d 692 (D.C. Cir. 1974).

Respondent has attempted (Br. in Opp. 6-7) to distinguish pretreatment standards from direct discharger BPT requirements on other grounds, but none of the distinctions is valid.

Respondent notes (Br. in Opp. 6) that a pretreatment standard may require "no discharge." So may a BPT regulation—and many have done so.

Respondent obeerves (Br. in Opp. 6-7) that "it is 'unlawful for *any* owner or operator of *any* source to operate *any* source in violation of' " a pretreatment standard. Section 307(d), 33 U.S.C. 1317(d). However, the same is true with respect to BPT limitations. Once a permit is issued to a direct discharger incorporating a BPT limit, it is illegal for that source to discharge in violation of the permit. Sections 301 and 309 of the Clean Water Act, 33 U.S.C. 1311 and 1319.

[16] Accordingly, the regulation at issue here does not allow FDF variances for new source indirect dischargers. 40 C.F.R. 403.13.

direct and indirect dischargers, new and existing sources are treated differently.[17] FDF variances are not available for new source direct or indirect dischargers because such plants can be planned and constructed so as to meet the national standards. It hardly follows, however, that existing indirect dischargers should be treated in the same way. On the contrary, as previously noted, existing indirect dischargers have just as much need for FDF variances as existing direct dischargers.

In sum, *duPont* and *National Crushed Stone Ass'n* settled the question of EPA's authority to issue FDF variances from categorical effluent standards. The remaining question here is whether Section 301(*l*) of the Act, 33 U.S.C. 1311(*l*), prohibits such variances in the case of toxic pollutants.

B. Section 301(*l*) of the Act Does Not Prohibit FDF Variances From Categorical Pretreatment Standards for Toxic Pollutants

This Court has recognized that the EPA's interpretation of the Clean Water Act is entitled to substantial deference. *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. at 83. See also *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 556 (1980); *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976). To sustain the Agency's position, a court need not "go[] so far as to hold that * * * [EPA's] construction of the Act was the only one it permissibly could have adopted." *Train* v. *NRDC*, 421 U.S. 60, 75 (1975) (Clean Air Act). Instead, a court must find only that EPA's construc-

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[17] For direct dischargers, compare 33 U.S.C. 1311(b)(1) and (2) with 33 U.S.C. 1316. For indirect dischargers, compare 33 U.S.C. 1317(b) with 33 U.S.C. 1317(c).

tion of this "complex statute" is "sufficiently reasonable to preclude the [court] from substituting its judgment for that of the Agency" (*id.* at 87). See also *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-7. Under this standard, EPA's interpretation of Section 301(*l*) of the Act, 33 U.S.C. 1311(*l*), clearly should have been sustained.

1. *The Language of Section 301(l) does not support the court of appeals' interpretation*

The court of appeals held that the language of Section 301 (*l*) clearly prohibits FDF variances (Pet. App. A42),[18] and it cannot be denied that on first reading the statutory language appears to support the Third Circuit's analysis. Section 301(*l*) provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list." A national categorical pretreatment standard is unquestionably a "requirement" of Section 301(b)(1)(A)(ii), 33 U.S.C. 1311(b)(1)(A)(ii), and an FDF variance "modifies" such a standard in the dictionary sense of the word, *i.e.*, it changes or alters it. See *Webster's Third New International Dictionary* 1452 (1976). Thus, if we go no further, the Third Circuit's decision seems correct.

This Court, however, does not " 'make a fortress out of the dictionary' " and has therefore "consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended con-

[18] By contrast, the Fourth Circuit found the language of Section 301(*l*) to be unclear and therefore deferred to the EPA's reasonable construction. *Appalachian Power Co.* v. *Train*, 620 F.2d at 1044-1048.

texts." *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 764 (1949) (footnote omitted); see also *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981). The problem with a literalistic interpretation of Section 301(*l*) is that it conflicts with other provisions of the Act and would lead to unreasonable results that Congress could not have intended. Under this interpretation, a limitation or standard for a toxic pollutant, once promulgated by EPA, could never be changed by the Agency for any reason, because any such change would be a proscribed "modification." Neither the discovery of an error in the Agency's previous analysis, the compilation of better or more accurate data, or subsequent scientific developments would allow the Agency to change the standard. Not only would FDF variances be prohibited, but administrative amendment or repeal of the standard would likewise be precluded. Unless Congress acted, the standard would remain unchanged.

It seems clear that Congress did not intend such results. Having entrusted the EPA with the responsibility for issuing requirements regarding toxic pollutants in the first place, Congress could not have wanted to prevent the Agency from altering those requirements after promulgation, as circumstances warrant. Indeed, far from precluding such alteration, in Section 307(b)(2), 33 U.S.C. 1317(b)(2), Congress provided that the EPA must "revise" its pretreatment standards, including those for toxic pollutants (see 33 U.S.C. 1317(b)(1)), "from time to time, as control technology, processes, operating methods, or other alternatives change." In our view, a statute that commands EPA to "revise" pretreatment standards for toxic pollutants but not to "modify" them is not "clear"on its face, as the court below

believed (Pet. App. A42) and as respondent maintains (Br. in Opp. 11).

If Section 301(*l*) does not prohibit all "modifications" in the literal sense, the question is which changes are allowed and which are proscribed. EPA's position has always been that Section 301(*l*) prohibits, in the case of toxic pollutants, those statutory modifications that are otherwise allowed under Section 301(c) and (g). As this Court has noted (*EPA* v. *National Crushed Stone Ass'n*, 449 U.S. at 71-72 (footnote omitted)):

> A variance under § 301(c) may be obtained upon a showing "that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Thus, the economic ability of the individual operator to meet the costs of effluent reductions may in some circumstances justify granting a variance from the 1987 limitations.

Under Section 301(g), the BAT limitations for any non-toxic pollutants may be modified based upon the quality of the water into which the discharge will be made.

EPA's construction is supported by the fact that the identical term—"modification"—is used in Section 301(c), (g) and (*l*). It is, of course, a canon of statutory interpretation that a term is presumed to have the same meaning in different portions of the same statute. *Bankamerica Corp.* v. *United States*, No. 81-1487 (June 8, 1983), slip op. 6-7; *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs*, No. 81-1891

(May 24, 1983), slip op. 9; *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980). EPA's interpretation also finds support in the legislative history. And most important, it gives Section 301(*l*) a reasonable meaning that is consistent with the purpose of that provision.

2. The legislative history of Section 301(l) indicates that Congress did not intend to prohibit FDF variances

Although the court of appeals stated (Pet. App. A43) that the meaning of Section 301(*l*) is "clear," the court looked beyond the language of the statute to the legislative history. However, instead of supporting the court of appeals' construction of the Act, the legislative history of the 1977 amendments buttresses EPA's view that Section 301(*l*)'s proscription was not directed to FDF variances. In accordance with EPA's interpretation, the legislative history indicates that Congress was focusing on the statutory modifications explicitly authorized by Section 301(c) and (g). Representative Roberts, the House floor manager of the Act, stated with regard to the Conference Committee bill:

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *Legislative History of the Clean Water Act of 1977*, at 328-329 (1978) [hereinafter

Leg Hist.].[19] Similarly, Senator Muskie, the Act's primary author and then Chairman of the Senate Committee on Environment and Public Works, directed his attention to Section 301(c) and (g) modifications without mentioning the FDF variance provision. *Leg. Hist.* 458, 461.

The court below reviewed this legislative history and agreed with EPA that it "does indicate that Congress was primarily concerned with prohibiting modifications under section 301(c) and (g)" (Pet. App. A42 (footnote omitted)). But relying (*ibid.*) on the fact that supporters of the 1977 amendments at times referred to Section 301(c) and (g) as "waiver" or "variance" provisions, the court found (Pet. App. A42) that Congress did not appear to have "used 'modification' as a term of art so as to exclude variance provisions from the proscription of section 301(*l*)." However, those references shed little light on the meaning of that provision. Just because Section 301(c) was described in passing during floor debate as a "variance" provision, it cannot be inferred, as the court of appeals apparently did (Pet. App. A42), that Congress intended for Section 301 (*l*) to apply to every "variance" provision. The court of appeals was guilty of bad logic and of ignoring the realities of the legislative process.

A far more telling feature of the legislative history is the absence of any indication that Congress intended to alter EPA's well-established and well-known practice of granting FDF variances. EPA had included FDF variance provisions in numerous BPT

[19] Congressman Roberts went on to note that, in contrast, certain pollutants not listed as toxic, known as nonconventional pollutants, "will be subject to waivers under section 301(c) * * * and section 301(g) * * *." *Leg. Hist.* 331.

regulations prior to the 1977 statutory amendments.[20] Similarly, in *duPont*, which was handed down while the 1977 amendments were under consideration, this Court stated that variances from BPT and BAT requirements are appropriate (430 U.S. at 128). Surely, had Congress intended to alter the Agency's practice of authorizing FDF variances, or to legislatively reverse *duPont*, Congress would have made that intention clear, just as it expressed its intention to limit the availability of Section 301(c) and (g) modifications. But no member of Congress, including the bill's leading sponsors in the House and Senate, expressed such an intent. In the absence of an express indication of an intent to overrule this preexisting law, the Third Circuit erred in ascribing such an intent to Congress. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979).

Respondent has taken issue with this argument on several grounds. First, respondent has asserted (Br. in Opp. 12) that Congress had no reason to refer to FDF variances because relatively few dischargers had applied for variances from BPT requirements by 1977. But irrespective of the number of the applicants, it is clear that by 1977 the FDF variance was a well-entrenched feature of EPA practice that could not have escaped Congress's notice. Not only did BPT regulations routinely contain a provision allowing such variances but, as noted, FDF variances had been prominently discussed in *duPont*.

Respondent also contends (Br. in Opp. 12) that in 1977 Congress had no need to address this Court's opinion in *duPont* because the BAT regulations involved in that case did not include an FDF variance provision and the focus of the 1977 amendments was

[20] See, *e.g.*, 40 C.F.R. 415.62 (1976).

on strengthening EPA's authority to regulate toxic pollutants, primarily through the vehicle of BAT regulations. However, the *BPT* regulations at issue in *duPont did* contain an FDF variance clause, and those regulations applied to pollutants that Congress, in the 1977 amendments, declared to be toxic.[21] In addition, in February 1977, prior to the enactment of the 1977 amendments, EPA had granted an FDF variance from national BPT regulations to a steam electric generating plant for copper, a toxic pollutant.[22] Since Congress's main concern in 1977 was toxic pollutants, the legislative history would have surely contained some reference to or criticism of *duPont* if Congress had intended to prohibit FDF variances for toxic pollutants. As noted, however, the legislative history is devoid of any such reference.

Finally, respondent has argued (Br. in Opp. 11) that the courts may not infer a nonstatutory exception, such as the FDF variance, where Congress has provided specific statutory exceptions, such as Section 301(c) and (g). This contention is flatly inconsistent with *duPont*, which upheld the nonstatutory FDF variance mechanism even though Section 301(c) was already part of the statute.

3. *EPA's interpretation of Section 301(l) gives that provision its most reasonable meaning and is fully consistent with the purpose of that provision*

a. Apart from its mistaken reading of the legislative history, the only other basis for the court of appeals' decision was its erroneous belief that Section

[21] See, *e.g.*, 40 C.F.R. 415.62 and 415.172 (1976).

[22] Final Decision of the Administrator FDF 76-08, Southern California Edison Co. Huntington Beach Generating Station, NPDES Permit No. CA0001163 (Feb. 22, 1977).

301(c) modifications "serve the same function" as FDF variances (Pet. App. A42). On that premise, the court concluded (*id.* at A43) that "[i]f Congress was willing to prohibit section 301(c) modifications where toxic pollutants are concerned, it is difficult to imagine why Congress would have permitted similar FDF variances for those same pollutants."

The court of appeals' analysis betrays a fundamental misunderstanding of the nature of both FDF variances and Section 301(c) modifications. An FDF variance is substantively the same as an amendment of the regulation establishing the effluent limitation or pretreatment standard. As this Court has written, an FDF variance "is an acknowledgment that the uniform * * * limitation was set without reference to the full range of [factors], to which the Administrator was to refer. Insofar as a [categorical] limitation was determined without consideration of a [factor] fundamentally different from those that were considered by the Administrator, that limitation is incomplete." *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. at 77-78. In effect, the FDF variance creates an appropriate subcategory for the plant or plants in question, a category that should have been established at the outset had EPA been aware of all the relevant factors and taken them into account. In considering whether an FDF variance will be granted, EPA cannot take into account factors that could not have justified a change in the national regulation, such as the economic plight of the affected plant or plants (40 C.F.R. 403.13(e)(3)) or "the impact of a [d]ischarge on the quality of the POTW's receiving waters" (40 C.F.R. 403.13(e)(4); see also *Crown Simpson Pulp Co.* v. *Costle*, 642 F.2d 323 (9th Cir.), cert. denied, 454 U.S. 1053 (1981)).

A modification under Section 301(c), by contrast, serves an entirely different purpose.[23] A Section 301 (c) modification requires a showing that the "modified requirements * * * will represent the maximum use of technology *within the economic capability of the owner or operator*" (33 U.S.C. 1311(c) (emphasis added)). Thus, a Section 301(c) modification excuses compliance with a valid requirement by a direct discharger. Unlike an FDF variance, such a modification is not in any way an acknowledgement that the effluent limitation was incomplete or deficient. As this Court has already explained (*EPA* v. *National Crushed Stone Ass'n*, 449 U.S. at 78):

> A variance based on economic capability * * * would allow a variance simply because the point source could not afford a compliance cost that is not fundamentally different from those the Administrator has already considered * * *. It would force a displacement of calculations already performed, not because those calculations were incomplete or had unexpected effects, but only because the costs happened to fall on one particular operator, rather than on another who might be economically better off.

Similarly, a Section 301(g) modification may be obtained by showing that if the modification is granted, BPT requirements will nevertheless be met; additional requirements for other sources will not result; and public water supplies, the environment, and human health will be protected. Like a Section 301 (c) modification, a modification under Section 301(g)

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[23] Modifications under Section 301(c) and (g) are not available for indirect dischargers. Under the statute, they are only available for direct dischargers.

does not suggest that the direct discharger's effluent limitation was inaccurate or incomplete.[24]

In short, the court of appeals' equation of FDF variances with Section 301(c) and (g) modifications is simply wrong.[25]

b. Once the fundamental difference between an FDF variance and a statutory modification is recognized, the soundness of the EPA's interpretation becomes apparent. While a literalistic reading of Section 301(*l*) would prevent EPA from ever changing a standard relating to a toxic pollutant—an unreasonable result that Congress could not have intended —EPA's interpretation leaves the Agency free to

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[24] By its terms, Section 301(g), which was enacted in 1977 together with Section 301(*l*), does not permit a "modification" for toxic pollutants. Thus, the primary purpose of Section 301(*l*) appears to have been to preclude Section 301(c) modifications for toxic pollutants.

[25] In concluding (Pet. App. A42) that Section 301(c) modifications and FDF variances "serve the same function," the court of appeals relied on the following statement in *National Crushed Stone Ass'n*, 449 U.S. at 74:

> A § 301(c) variance * * * creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class.

This statement, however, makes no reference whatever to FDF variances from either BPT or BAT standards. The Court was merely pointing out that a Section 301(c) modification results in a standard that is within the economic capability of the discharger. It does not follow, however, as the court of appeals concluded (Pet. App. A42), that this Court viewed Section 301(c) modifications and FDF variances as "serv[ing] the same function." On the contrary, later in *National Crushed Stone Ass'n* (449 U.S. at 77-78), this Court took pains to point out the significant differences between these two measures.

change the categorical standard by amendment or FDF variance, if warranted. But EPA's interpretation also means that compliance with a valid categorical standard for a toxic pollutant may never be excused due to the economic plight of a particular plant or the quality of the receiving waters; elimination of toxic pollutants must take precedence over such considerations. This interpretation is entirely consistent with the 1977 amendments' emphasis on restricting the discharge of toxic pollutants. *Leg. Hist.* 326, 454.

c. Respondent has argued (Br. in Opp. 13) that while EPA may not grant FDF variances for toxic pollutants, EPA may "revise" its limitations and standards for such pollutants through informal rulemaking procedures. While contending (Br. in Opp. 11) that FDF variances are "clear[ly]" "modifications" proscribed by Section 301(*l*), respondent does not explain why the revisions it espouses are any less "modifications."

Respondent has also conceded throughout this litigation that EPA has the flexibility to establish plant-specific requirements by creating tailor-made subcategories during the national rulemaking process. However, respondent has offered no convincing argument why it is a reasonable construction of the Act to allow the creation of such subcategories during the initial rulemaking but unreasonable to accord EPA the same flexibility through the FDF variance process in those relatively few cases in which a discharger can demonstrate that EPA has not adequately considered some factor during the rulemaking process.[26]

[26] Respondent has offered various arguments on this point over the course of this litigation, but none is well founded. In the court below, respondent contended that the FDF variance process circumvents the public notice and comment requirements attendant to national rulemakings. Transcript of Oral Argument in Court of Appeals at 249. However, the FDF variance process clearly provides for public notice and comment. 40 C.F.R. 403.13(j). In opposing the petitions for certiorari, respondent argued that the FDF variance procedure entails several layers of review and public comment and is thus "extraordinarily slow of resolution" (Br. in Opp. 13). However, the review procedures about which respondent complains help to ensure that FDF variances will only be granted in the relatively few appropriate cases. Respondent's claim (Br. in Opp. 14) that FDF variance applications permit companies to delay compliance with the Act is inconsistent with respondent's assertion (Br. in Opp. 7) that "[f]ew companies are interested in the FDF variance." Finally, respondent has argued that Section 307(b)(2) of the Act, 33 U.S.C. ~~(1976 ed.)~~ 1317(b)(2), contains the exclusive statutory mechanism for correcting the national pretreatment standards. That section directs EPA, "from time to time," to revise the standards "as control technology, processes, operating methods, or other alternatives change." Clearly, however, this provision is intended to reflect periodic changes in the industry, not to adjust the national standards in light of preexisting factors not considered by EPA at the time of promulgation.

Moreover, since respondent agrees that EPA may adopt rules creating special categories for plants with fundamentally different factors and that EPA may amend its rules setting requirements for toxic pollutants, respondent would appear to concede by implication that EPA, after issuing categorical requirements relating to toxic pollutants, may revise those requirements to take into account the fundamentally different factors affecting a particular plant or group of plants.[27] Such an amendment, of course, would be

[27] Following the decision in this case, EPA announced that it would entertain petitions for amended rulemaking by certain indirect dischargers who were previously eligible for FDF variances. See 48 Fed. Reg. 52396 (1983). EPA explained (*ibid.*) that in such cases "it may be appropriate to

substantively indistinguishable from an FDF variance. Thus respondent's disagreement with the Agency appears to concern, not the result achieved when an FDF variance is granted for a toxic pollutant, but the procedure employed. There is however, no evidence that Section 301(*l*) was concerned with such procedural questions. Furthermore, respondent has never provided a cogent or consistent explanation of why the rulemaking procedure it favors is preferable. Respondent has argued, alternatively, that the FDF variance procedure is too summary and too slow. See note 25, *supra*. At all events, if deference to EPA's construction of the Clean Water Act means anything, it surely must mean that the Agency is free to choose between these two procedures. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

d. FDF variances are granted infrequently[28] and present no threat to the achievement of the Clean Water Act's goal of improving the quality of the nation's waters through national regulation.[29] The

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issue specific categorical standards for such facilities, treating them as a separate subcategory with more, or less, stringent standards as appropriate."

[28] As respondent itself acknowledges (Br. in Opp. 12), by 1977 only 50 of 4,000 major industrial dischargers covered by BPT limits had applied for FDF variances, and only two variances had been granted. As of today, only four variances have been granted to direct dischargers, and none has yet been granted to an indirect discharger. The Agency estimates that approximately 40 FDF variance requests have been filed by indirect dischargers and are pending.

[29] See *Crown Simpson Pulp Co.* v. *Costle*, 642 F.2d 323 (9th Cir.), cert. denied, 454 U.S. 1053 (1981) (upholding EPA's veto of FDF variances from BPT requirements that had been granted by the State based upon lack of harm to receiving waters).

small number of variances obtained, however, does not mean that such variances are unimportant or unnecessary. There are at least 60,000 existing indirect dischargers potentially subject to national pretreatment standards. Within the past several years, EPA has promulgated BAT-level pretreatment standards for 17 industrial categories, and it is now moving rapidly toward completion of BAT-level requirements for an additional seven categories within the next year. All of these regulations were or are being developed under the very rationale that this Court found persuasive in *duPont*, *i.e.*, that it is sound administrative practice to promulgate categorical regulations for existing dischargers as soon as possible with an FDF variance available as a safety valve. In light of the stringent deadlines that have been imposed on the Agency, EPA has found it necessary to base the national standards on the more typical plants and to focus on unique situations through the FDF variance process. In the past, the FDF variance mechanism has helped to protect the national standards against challenges by plants with unique circumstances.[30] If FDF variances for toxic pollutants may not be granted, then existing regulations may be more vulnerable in the future. And issuance of standards now under development by the Agency may be delayed if EPA must account for all

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[30] See, *e.g.*, *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979) (rejecting challenge to BPT effluent limitations guidelines for ore mining direct dischargers because FDF variance procedure was available to address unique plant); *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1040-1041 (D.C. Cir. 1978) (finding existence of FDF variance "crucial" to affirmance of BPT regulations for direct dischargers); *American Iron & Steel Institute* v. *EPA*, 526 F.2d 1027, 1061 (1975), modified, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978).

unique plant-specific factors in developing these standards.

In sum, the FDF variance provision is a longstanding and integral feature of the EPA's categorical rulemaking activities for direct and indirect dischargers. It provides an important, albeit limited, safety valve for atypical plants that are improperly regulated by the initial rule. There is no sound basis for disturbing EPA's construction of the Act which allows such variances to be granted for all pollutants. Upsetting EPA's interpretation at this late juncture could inject considerable uncertainty into the implementation of the Act and could thwart the achievement of its goals.

CONCLUSION

The judgment of the court of appeals should be reversed.

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